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RESCUING JUDICIAL ACCOUNTABILITY FROM THE REALM OF POLITICAL RHETORIC

Charles Gardner Geyh[†]

INTRODUCTION

Attacks on judges have come and gone at generational intervals since the founding of the nation. Since the latest cycle of anticourt sentiment erupted in the mid-nineties, law school symposia on judicial independence have proliferated like rabbits.¹ As a result, judicial independence has been explored as never before and its contours mapped with considerable care.

In the course of this cartographic exercise, judicial accountability has often been identified as a critical component of the judicial independence landscape; thus, for example, Professor Stephen Burbank has characterized judicial independence and accountability as “different sides of the same coin.”² Funny thing about coins, though. Pretty much everyone knows that F.D.R. is on the heads side of a dime just as most of us who study the courts now know the ins and outs of judicial independence. But the dime’s tails side doesn’t get as much attention: “a torch and stuff” may be the most that many of us can recall without looking, and our understanding of judicial accountability and its limits is comparably limited.

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¹ See, e.g., Symposium, *Federal Judicial Independence*, 46 MERCER L. REV. 637 (1995); Symposium, *Independence of the Judiciary*, 38 U. RICH. L. REV. 565 (2004); Symposium, *Judicial Independence*, 25 HOFSTRA L. REV. 703 (1997); Symposium, *Judicial Independence and Accountability*, 72 S. CAL. L. REV. 311 (1999); Symposium, *Judicial Review and Judicial Independence: The Appropriate Role of the Judiciary*, 14 GA. ST. U. L. REV. 737 (1998); Symposium, *Perspectives on Judicial Independence*, 64 OHIO ST. L.J. 1 (2003); Symposium, *Special Series: Judicial Independence*, 29 FORDHAM URB. L.J. 791 (2002).

² Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 S. CAL. L. REV. 315, 339 (1999).

The peril of leaving judicial accountability ill-defined is that it can be co-opted and misused more easily. Events surrounding the sad and peculiar case of Teresa Schiavo illustrate this point.

In 1990, Ms. Schiavo suffered a cardiac arrest, which left her in what most doctors characterized as a persistent vegetative state.³ In 1998, Ms. Schiavo's husband asked a Florida state court for permission to withdraw her feeding tube, and in 2000 the court agreed, over the objection of Ms. Schiavo's parents. After appeals failed and the tube was removed in 2003, Christian conservatives swiftly and successfully lobbied the Florida legislature to pass a law empowering Governor Jeb Bush to order Ms. Schiavo's feeding tube reinserted, which he did, only to have a court invalidate the law in 2004. In 2005, the tube was removed again, and the conservative Christian lobby raced to Washington, where it urged Congress to pass a law giving a federal judge the authority to hear the Schiavo case anew. Congress quickly obliged with special legislation, signed into law by President Bush, bestowing jurisdiction on a Florida district court to review *de novo* all federal questions presented by the Schiavo case. Without issuing an interim order to reinsert Ms. Schiavo's feeding tube, the federal judge to whom the case was assigned swiftly reached the same conclusion as his state counterpart, the United States Court of Appeals for the Eleventh Circuit affirmed, and Ms. Schiavo passed away several days later.

Conservative Republican sponsors of the legislation were furious at the federal judges involved and offered a rainbow of proposals to curb the courts: impeach the miscreants, strip their jurisdiction, slash their budgets, disestablish their offices, and deprive Democrats of the power to filibuster nominees of a President committed to appointing "common sense judges who understand that our rights are derived from God."⁴ Each of these proposals was advanced in the name of promoting judicial accountability.

In the aftermath of the Schiavo legislation, House Judiciary Committee Chair James Sensenbrenner struck a conciliatory tone, declaring that "while [he] vociferously disagree[d] with the Federal Judiciary's handling of this case, that does not mean that Congress should respond by attempting to neuter the courts," and shared the view of a conservative commentator that Congress should not "regulate judicial

³ For a summary of the facts of the Schiavo matter as described in this paragraph, see Ar-
ian Campo-Flores, *The Legacy of Terri Schiavo*, NEWSWEEK, Apr. 4, 2005, at 26.

⁴ Sani Dolbee, *Frontline Explores Bush's Religious Bent*, THE SAN DIEGO UNION TRIB.,
Apr. 29, 2004, at E1 (quoting President Bush). For a summary of post-Schiavo threats, see Carl
Hulse & David D. Kirkpatrick, *DeLay Says Congress Lets Courts 'Run Amok'*, N.Y. TIMES,
Apr. 8, 2005, at A21.

decision-making through such extreme measures as retroactively removing lifetime appointees through impeachment.”⁵ Even so, he continued:

This does not mean that judges should not be punished in some capacity for behavior that does not rise to the level of impeachable conduct. I think we can all agree that public servants, especially those with life tenure, must be accountable for their actions to co-equal branches of government as well as the American people. The appropriate questions are how do we punish and who does the punishing.⁶

Against this backdrop, “judicial accountability” can be misconstrued as code for the proposition that judicial independence is anathema and must be replaced with mechanisms for judicial punishment and control. The 2003 Report of the American Bar Association’s Commission on the 21st Century Judiciary begins with a statement of the “enduring principles” that “ought to guide the twenty-first century judiciary.”⁷ After declaring that judges should uphold the rule of law, be independent, be impartial, possess the appropriate temperament, and so on, the Commission—which I served on as Reporter—included as its eighth and final principle that “Judges should be constrained to perform their duties in a manner that justifies public faith and confidence in the courts.”⁸ This is, of course, simply an elliptical way of saying that judges should be accountable. But as Commission draftsman, I was instructed not to use the “A” word in the caption. In the Commission’s view, “accountability” had been captured by forces hostile to judicial independence and had acquired a secondary meaning antithetical to the principles that the Commission was seeking to articulate. Although the Commission’s underlying explanation for this

⁵ The Honorable F. James Sensenbrenner, Jr., *Zale Lecture in Public Policy*, Stanford Univ. (May 9, 2005), (transcript available at http://judiciary.house.gov/media/pdfs/stanford_judgespeechpressversion505.pdf).

⁶ *Id.* It is not entirely clear how Mr. Sensenbrenner thought that the other branches of government or the American people should punish judges for their decision-making. He went on to discuss the judicial discipline statute, which authorizes judges to discipline their own for certain forms of misconduct. But the discipline statute is intra-judicial, and explicitly exempts complaints about the merits of judicial decisions from its scope. Elsewhere in his speech, Sensenbrenner proposed to establish an Inspector General for the federal judiciary to promote fiscal accountability; for a legislator casting about for means short of impeachment to “punish” judges for their decisions, the creation of a new Inspector General’s office would be a felicitous development.

⁷ AMERICAN BAR ASSOCIATION, *JUSTICE IN JEOPARDY: REPORT OF THE COMMISSION ON THE 21ST CENTURY JUDICIARY* 5 (2003) [hereinafter *JUSTICE IN JEOPARDY*].

⁸ *Id.* at 12.

eighth principle mentioned accountability, it did so in a highly defensive way:

Judicial independence, then, must be tempered by judicial accountability. We are mindful that the phrase "judicial accountability" is subject to misuse. It can be employed in the service of those who would, in the name of "judicial accountability," obliterate judicial independence and the rule of law altogether by intimidating judges into contorting the law to reach results that are popular with temporary majorities of the public. In our view, however, accountability should be defined more narrowly, to serve the principles of a good judicial system that we enumerate here.⁹

This article takes a closer look at the tails-side of the judicial independence-judicial accountability coin by constructing a judicial accountability taxonomy, and in so doing seeks to rescue judicial accountability from the realm of political rhetoric. The task of unpacking judicial accountability is complicated by the fact that accountability—like independence—is not monolithic. The effectiveness, desirability, and even the propriety of various mechanisms for promoting judicial accountability can be context-dependant. What works for federal judges may not work for their counterparts in the states; what is true for Texas may not be true for Wisconsin; and what is appropriate for trial courts may not be appropriate for courts of appeal. One must therefore avoid overgeneralization. At the same time, I worry about losing the forest for the trees, and see value in stepping back from specifics to consider accountability on a more theoretical plane—hence, this article.

I begin by defining judicial accountability with a brief discussion of the purposes that it serves, before subdividing it into three discrete genera: institutional accountability, behavioral accountability, and decisional accountability, each of which may be subdivided into several species. This exercise reveals that in the judicial accountability family, there is but one discrete sub-species, situated in the decisional accountability genus, that does not further accountability's proper purpose and is therefore conceptually problematic: direct political accountability for competent and honest judicial decision-making error.

In the ongoing judicial accountability frenzy, court critics insist that they harbor no desire to jeopardize judicial independence by pun-

⁹ *Id.*

ishing judges for honest mistakes or disagreements; rather, they regard the decisions they criticize as reckless or deliberate usurpations of power, in which the judges have willfully disregarded the law and imposed their own personal values or political preferences. Critics of the critics, however, argue that court-bashers are simply seeking to intimidate judges into contorting the law to reach outcomes the critics favor. The critical question, then, becomes one of classification: how does one distinguish simple disagreements as to applicable facts and law, for which direct political accountability is inappropriate, from deliberate usurpations of political power, which are properly subject to sanction?

To no small extent, the issue turns on the judge's state of mind: if a decision was erroneous, was the error an honest mistake or a disingenuous power-grab? Analogizing to First Amendment limitations on defamation liability for public figures, I argue that in cases of decision-making error, the presumption should be that the judge in question was competent and honest, absent direct evidence to the contrary. This is, in fact, the approach that Congress has adopted in the context of judicial impeachments. Although the House was willing to infer a bad motive from judicial error alone in several early impeachment proceedings, the Senate (and ultimately the House as well) insisted that there be extrinsic evidence of *mens rea* before a judge could be removed for a usurpation of power. Although such a presumption complicates legislators' ability to punish judges for "legislating from the bench," "judicial activism," "usurpations of power," or other fashionable phrases of the day, it strikes the optimal balance between judicial independence and accountability.

THE OBJECTIVES OF JUDICIAL ACCOUNTABILITY

Judicial independence, correctly understood, is not an end in itself. Although it is sometimes characterized as such in the flowery speeches of public officials, most thoughtful scholars recognize that judicial independence is an instrumental value—a means to achieve other ends.¹⁰ As an instrumental value, judicial independence has limits, defined by the purposes it serves. Disagreement persists as to what those purposes are, but most would accept some variation on the theme that judicial independence enables judges to follow the facts and law without fear or favor, so as to uphold the rule of law, preserve the separation of governmental powers, and promote due proc-

¹⁰ See, e.g., Stephen B. Burbank & Barry Friedman, *Reconsidering Judicial Independence*, in *JUDICIAL INDEPENDENCE AT THE CROSSROADS* 9, 11-14 (Stephen B. Burbank & Barry Friedman eds., 2002).

ess.¹¹ Given these objectives, one may fairly conclude that judges who are subject to intimidation from outsiders interested in the outcomes of cases the judges decide lack the independence necessary to follow the facts and law. At the same time, one may just as fairly conclude that judges who are so independent that they can disregard the law altogether without fear of reprisal likewise undermine the rule of law values that judicial independence is supposed to further.

Judicial accountability is yin to the judicial independence yang. Although some trumpet judicial accountability as if it were an end in itself, accountability—like independence—is better characterized as an instrumental value that promotes three discrete ends: the rule of law, public confidence in the courts, and institutional responsibility.

First, judicial accountability promotes the rule of law by deterring conduct that could compromise judicial independence, integrity, and impartiality. To say that judicial accountability promotes judicial independence seems counterintuitive. Accountability does, after all, diminish a judge's literal independence: the judge who is made accountable to an impeachment process, for example, loses her "independence" to take bribes with impunity. But properly employed, accountability merely diminishes a judge's freedom to make herself dependant on inappropriate internal or external influences that could interfere with her capacity to follow the rule of law. By deterring bribery, favoritism, bias and so on, accountability promotes the kind of independence needed for judges to adhere to the rule of law.

Second, judicial accountability promotes public confidence in judges and the judiciary. Regardless of whether independent judges follow the law, if the public's perception is otherwise, reforms calculated to render judicial decision-making subject to popular or political branch control are sure to follow, to the ultimate detriment of the rule of law itself. A system of judicial accountability that reassures a sometimes-skeptical public that judges are doing their jobs properly and yet respects the judiciary's independence can forestall resort to more draconian and counter-productive forms of court control.

¹¹ *Id.* at 14; see also Calvin R. Massey, *Rule of Law and the Age of Aquarius*, 41 HASTINGS L.J. 757, 760 (1990) (book review) (quoting Geoffrey de Q. Walker for the proposition that "[a]n independent judiciary is an indispensable requirement of the rule of law"); L. Ralph Mecham, *Introduction to Mercer Law Review Symposium on Federal Judicial Independence*, 46 MERCER L. REV. 637, 638 (1995) (explaining that judicial independence is a "cornerstone of a free society and the rule of law"); William C. Whitford, *The Rule of Law*, 2000 WIS. L. REV. 723, 738 (describing judicial independence as "widely seen as critically necessary to the effective implementation" of a rule of law); Frances Kahn Zemans, *The Accountable Judge: Guardian of Judicial Independence*, 72 S. CAL. L. REV. 625, 631 (1999) (noting that "an independent judiciary" is a "necessity" for the rule of law).

Third, judicial accountability promotes institutional responsibility by rendering the judiciary responsive to the needs of the public it serves as a separate branch of government. The public is entitled to courts that administer justice effectively, efficiently, and expeditiously. The judiciary spends taxpayer dollars just like the other branches of government and, just like the other branches, the judiciary should be subject to regulation aimed at making its operations more streamlined and cost effective.

JUDICIAL ACCOUNTABILITY GENERA

Devising a judicial accountability taxonomy could proceed in any of several ways. One way would be to subdivide accountability with reference to the individuals or entities to which judges are accountable: legislators, governors and presidents, fellow judges, the electorate, prosecutors, judicial conduct organizations, and so on. Another way would be to employ the various accountability-promoting devices as an organizing principle: impeachment, elections, discipline, budgetary oversight, etc. My goal here, however, is to distinguish beneficial or at least benign forms of accountability from those that are more problematic, when analyzed in light of the three aforementioned purposes accountability serves. To do that most effectively, it is best to subdivide accountability into the three forms of judicial conduct that accountability mechanisms target: (1) the conduct of judges collectively as a branch of government (institutional accountability); (2) the behavior of judges extraneous to the merits of judicial decisions (behavioral accountability); and (3) the rulings that judges make (decisional accountability).¹²

Institutional Accountability

Institutional accountability concerns the accountability of judges, collectively, for the performance of the judiciary as a separate and independent branch of government. To ensure that courts administer justice wisely and well, the judiciary is subject to two discrete species of institutional accountability. First, the judiciary is accountable for its spending: Congress and state legislatures control the size of their respective judiciaries' budgets and, with only isolated exceptions (in

¹² In a short piece written several years ago, Judge Wendell Griffen proposed to subdivide judicial accountability along comparable lines. See Wendell L. Griffen, Comment, *Judicial Accountability and Discipline*, 61 LAW & CONTEMP. PROBS. 75, 75 (1998) (dividing the issue of judicial accountability into the three levels of "political accountability, decisional accountability, and behavioral accountability").

nine states with judicial salary commissions that have the authority to make binding salary determinations), decide whether and when to adjust judicial salaries upward.¹³ Second, the federal judiciary is accountable for its operations both to Congress, which is authorized to regulate court size, structure, practice, procedure, and jurisdiction, and to the judiciary itself, insofar as Congress has delegated to the courts the authority to self-administer and promulgate its own rules of practice and procedure.

Of the three objectives of accountability discussed earlier (promoting the rule of law, public confidence, and institutional responsibility), institutional accountability is most closely connected to the third, institutional responsibility, by rendering the judiciary responsive to the needs of the public it serves as a separate branch of government. It can, however, serve all three objectives. For example, in 1891, when Congress restructured the judiciary to establish circuit courts of appeals, it rendered the judiciary, as a branch, more responsive to the public need for greater access to appellate courts. But it also provided a more effective system to correct district court errors (thereby promoting the rule of law) and addressed growing concerns that district judges had become too despotic (so restoring public confidence).

It bears emphasis that the three genera of judicial accountability discussed here are defined and circumscribed with reference to the conduct each seeks to control. Thus, "institutional accountability" is limited to measures aimed at making the judiciary answerable for, or otherwise improving, its administration as a branch. If devices typically aimed at promoting institutional accountability—such as congressional oversight of court budgets or jurisdiction—are deployed instead to control judicial decision-making on specific issues, they are better classified in the context of decisional accountability mechanisms.

Institutional accountability has its limits. Among the states, many constitutions create explicitly independent judiciaries with powers of self-administration that enable state courts to resist encroachments from their legislatures to a greater extent than their federal court counterparts.¹⁴ In the federal system, the scope of legislative power is quite broad but still subject to several limits. First, the U.S. Constitu-

¹³ JUSTICE IN JEOPARDY, *supra* note 7, at 85 (discussing the twenty states with judicial salary commissions, nine of which have the authority to issue binding salary determinations absent formal legislative branch disapproval).

¹⁴ Michael L. Buenger, *Of Money and Judicial Independence: Can Inherent Powers Protect State Courts in Tough Fiscal Times?*, 92 KY. L.J. 979, 1026 (2004) ("The revision of judicial articles over the last fifty years illustrates the shift from relying on the legislature for the institutional structure and authority of courts, toward anchoring such matters directly in the constitution [sic] and the body of the judiciary itself.").

tion directs that judicial power be vested in a Supreme Court, which deprives Congress of the authority to disestablish the Supreme Court directly, and perhaps indirectly as well, by crippling its ability to function.¹⁵ Second, as to the lower courts, the Constitution vests Congress with the discretion to establish (and by negative implication disestablish) inferior courts; but even then, Article III delegates “The judicial Power” to the Supreme and inferior courts alone.¹⁶ Once Congress establishes inferior courts vested with Article III powers, it may not regulate those courts in ways that deprive them of their constitutional monopoly on judicial power.¹⁷ Third, the judiciary’s status as a separate and independent branch may confer some measure of inherent authority to resist encroachments from the political branches—an argument that has prevailed in state systems.¹⁸ Fourth, governmental actions implementing institutional accountability measures are subject to the same constitutional limitations (for example, the Equal Protection and Due Process Clauses) as any other governmental action.¹⁹ That said, Congress has traditionally afforded the courts considerably greater branch independence than the text of the Constitution requires and has rarely tested the limits of its power to hold the judiciary accountable as an institution. As a consequence, the limits enumerated here remain ill-defined and largely speculative.²⁰

Behavioral Accountability

Behavioral accountability holds judges answerable for conduct (extraneous to the merits of their rulings in specific cases) that could reflect adversely on their integrity, independence, or impartiality. To the extent that judges are held responsible for conduct on or off the bench that compromises their capacity to decide cases properly, it furthers both the rule of law and the public confidence objectives of accountability.

There are at least two species of behavioral accountability: judicial and extrajudicial. The judicial aspect of behavioral accountability holds judges accountable for conduct occurring on the job. Judges who engage in *ex parte* communications, hear cases when their impar-

¹⁵ U.S. Const. art. III, § 1.

¹⁶ U.S. Const. art. III, § 2.

¹⁷ See, e.g., *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995) (invalidating legislation reopening final judgments because it infringed on judicial power).

¹⁸ Buenger, *supra* note 14 (summarizing cases construing inherent powers of state courts in the context of court-funding battles).

¹⁹ Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 *MERCER L. REV.* 697, 703-04 (1995).

²⁰ CHARLES GARDNER GEYH, *WHEN COURTS AND CONGRESS COLLIDE* (2006).

tiality is in doubt, are discourteous, exhibit racial bias, or take public positions on proceedings pending before them, jeopardize the integrity of the judicial process to the detriment of their independence and impartiality (even if their misconduct is not manifested in a judicial decision).

The extrajudicial component of behavioral accountability targets conduct arising off the bench that diminishes a judge's fitness for judicial office. Some problems can arise in the course of a judge's private life. If, for example, a judge solicits or accepts gifts from prospective litigants, it could compromise her impartiality. Other problems arise in the context of professional, civic, charitable, and political activities. If judges moonlight as private practitioners, their responsibilities as lawyer-advocates could distract them from their judicial duties and undermine their credibility as neutral magistrates; if judges solicit funds for charities, it could lead them to trade on the power and influence of their stations for the benefit of private organizations; and if judges become political party leaders, it could create a tension between their partisan obligations and their duty as judges to follow the law.

Among the states, behavioral accountability is predominately regulated by court-promulgated codes based on the American Bar Association's *Model Code of Judicial Conduct*,²¹ although impeachment, criminal prosecution, and other accountability-promoting devices can also play a role.²² Judges are answerable to judicial conduct commissions that enforce their respective codes.²³ At the federal level, the Judicial Conference of the United States has adopted its own variation of the *Model Code of Judicial Conduct*, the *Code of Conduct for United States Judges*, but uses its Code primarily for advisory purposes, rather than as a tool for enforcement.²⁴ The federal judicial discipline statute authorizes the judiciary to discipline judges for conduct "prejudicial to the effective and expeditious administration of the business of the courts."²⁵ The statute excludes conduct relating to the merits of a judicial decision from its scope, effectively limiting its purpose to promoting behavioral accountability.²⁶ Although the vague

²¹ See MODEL CODE OF JUDICIAL CONDUCT (2004).

²² For a summary of other mechanisms for promoting judicial accountability, see Charles Gardner Geyh, *The Elastic Nature of Judicial Independence and Judicial Accountability*, in *THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE* 167 (7th ed. 2002).

²³ JEFFREY M. SHAMAN, STEPHEN LUBET & JAMES J. ALFINI, *JUDICIAL CONDUCT AND ETHICS* 6-9; 433-94 (3d ed. 2000).

²⁴ CODE OF CONDUCT FOR UNITED STATES JUDGES (Judicial Conference of the U.S. 2000), available at <http://www.uscourts.gov/guide/vol2/ch1.html> (last visited Feb. 15, 2005).

²⁵ 28 U.S.C. § 351 (Supp. II 2002).

²⁶ *Id.*

language of the statute might logically benefit from the more detailed guidance of the Code of Conduct, the federal courts have eschewed that approach in favor of regulating conduct under the general statutory standard, and cross-referencing applicable sections of the Code only rarely.²⁷

Like institutional accountability, behavioral accountability has its limits. Congress and state legislatures may impeach and remove judges for malfeasance. Impeachment is, however, an exceedingly cumbersome process, and is available to redress only the most serious forms of misconduct, on the order of "Treason, Bribery, and other high Crimes and Misdemeanors."²⁸ To promote behavioral accountability for lesser forms of misconduct, Congress has used its regulatory authority over the courts to establish mechanisms for judicial discipline and disqualification, but Congress arguably lacks the power to enforce those mechanisms itself, and so has delegated that task to the judiciary.²⁹ At the state level, the final appeal from decisions of judicial conduct organizations are ordinarily heard by the state supreme court (in forty-one states) or a court specially designated to hear disciplinary matters (in nine states), which insulates judicial discipline from legislative branch control.³⁰ The judiciary, in turn, has limits on its enforcement authority too. Although state judiciaries are typically authorized to remove judges for misconduct, the federal judiciary is not.³¹ Moreover, disciplinary actions of state and federal judiciaries are subject to the strictures of their constitutions, such as

²⁷ Jeffrey N. Barr & Thomas E. Willging, *Decentralized Self-Regulation, Accountability, and Judicial Independence Under the Federal Judicial Conduct and Disability Act of 1980*, 142 U. PA. L. REV. 25, 84 (1993) (reporting that only 3 percent of judicial orders in disciplinary cases cite to the *Code of Conduct for United States Judges*).

²⁸ U.S. Const. art. II, § 4.

²⁹ Peter M. Shane, *Who May Discipline or Remove Federal Judges? A Constitutional Analysis*, 142 U. PA. L. REV. 209 (1993). Other commentators go further still, arguing that Congress lacks the authority to subject Article III judges to discipline at the hands of other Article III judges; therefore, the federal judicial discipline statute is unconstitutional. See, e.g., Martin H. Redish, *Judicial Discipline, Judicial Independence, and the Constitution: A Textual and Structural Analysis*, 72 S. CAL. L. REV. 673 (1999). But see NAT'L COMM'N ON JUDICIAL DISCIPLINE AND REMOVAL, REPORT OF THE NATIONAL COMMISSION ON JUDICIAL DISCIPLINE & REMOVAL 14-17 (1993) (concluding that the Judicial Councils Reform and Judicial Conduct and Disability Act is constitutional).

³⁰ See SHAMAN, LUBET & ALFINI, *supra* note 23, at 433-34.

³¹ *Id.* at 437 (discussing removal as a sanction available to state judicial conduct organizations). In the federal system, the discipline statute does not authorize the judiciary to remove one of its own. 28 U.S.C. § 354(3)(A) (2004). Moreover, there is considerable doubt as to whether such removal authority would be constitutional. See Shane, *supra* note 29, at 239 ("The Supreme Court might well regard the constitutionally explicit singling out of removal and disqualification as consequences of impeachment as setting categorical limits to those sanctions that might be imposed through other means.").

due process constraints and First Amendment limits on the regulation of judicial speech.³²

Decisional Accountability

Decisional accountability holds judges answerable for their judicial decisions. By providing a means to correct and discourage judicial error, decisional accountability can further both the rule of law and public confidence objectives of judicial accountability.

Decisional accountability targets two species of judicial error: intentional and unintentional. Any number of motives may underlie intentional errors, including financial gain, favoritism, power-lust, and political, religious, racial, gender, or cultural bias, to name a few. It is hard to quarrel with the notion that judges should be accountable for intentional decision-making error—the judge who makes such errors has knowingly violated her oath of office, in which she swore to uphold the law.³³

There are, however, exceptional circumstances that lead judges to make intentional decision-making errors. In a widely publicized case decided in the late 1990s, for example, California Court of Appeals Judge Anthony Kline openly disregarded the controlling precedent of the California Supreme Court. His dissent from the appellate panel's ruling argued that the Supreme Court's decision was wrong and that in the unusual context of that case, the only circumstance under which the Supreme Court would have an opportunity to reconsider its earlier decision would be on an appeal from a ruling that rejected the controlling precedent.³⁴ Kline wrote, "There are rare instances in which a judge of an inferior court can properly refuse to acquiesce in the precedent established by a court of superior jurisdiction. . . . This is, for me, such an instance."³⁵ Kline's conduct was subsequently investigated by his state's judicial conduct commission, which, the judge's defenders argued, intruded upon his independence.³⁶

A judge disgruntled by controlling precedent may almost always call her objections to the attention of a higher court simply by raising them in an opinion that grudgingly follows the offending law—objections that the losing party may then raise in its argument for

³² See, e.g., *Republican Party of Minn. v. White*, 536 U.S. 765 (2002) (invalidating certain Code-imposed restrictions on judicial campaign speech).

³³ See 28 U.S.C. § 453 (codifying the judicial oath).

³⁴ For a discussion of the case and its background, see Sambhav N. Sankar, Comment, *Disciplining the Professional Judge*, 88 CAL. L. REV. 1233, 1233-35 (2000).

³⁵ *Morrow v. Hood Commc'ns, Inc.*, 69 Cal. Rptr. 2d 489, 490-91 (Cal. Ct. App. 1997) (Kline, J., dissenting).

³⁶ Sankar, *supra* note 34, at 1234-35.

reversal before a higher court. Insofar as that option was unavailable to Kline, his case was unique; setting aberrational exceptions to one side, however, judicial defiance of the law is otherwise unacceptable. Yes, the circumstances under which judges disregard applicable law may be germane to assessing whether scarce disciplinary resources are better allocated elsewhere, and what (if any) sanctions should be imposed. For that reason, well-intentioned defiance (as in this example, defiance aimed at setting the law right) may not be worth pursuing. But devotees of civil disobedience the world over understand that when they intentionally violate a law—even when their motives are pure and the law is unjust—they are subject to sanctions. That should be especially true of judges who, by virtue of taking an oath to uphold the law, have foresworn law reform by unlawful means.

Two remedies for intentional error are worth mentioning. First, the *Model Code of Judicial Conduct* requires that “[a] judge shall be faithful to the law,”³⁷ and subjects judges who willfully disregard the law to discipline—although in the federal system, the discipline statute immunizes judges from discipline for matters related to the merits of a dispute.³⁸ Second, judges can be impeached. As a conceptual matter, these intentional derelictions of duty are fairly characterized as violations of the public trust (to borrow Alexander Hamilton’s phrase) that can rise to the level of impeachable offenses—the judge who knowingly abandons her obligation to follow the law for personal gain is corrupt, regardless of whether she gains by taking bribes, helping family or friends, usurping power, or furthering pet political causes.³⁹

When it comes to unintentional decisional errors, the *Code of Judicial Conduct* directs judges to “maintain professional competence” in the law and exposes incompetence to discipline.⁴⁰ In practice, imposing sanctions for incompetence can be problematic in close cases because one person’s error can be another’s ineptitude. Because of this difficulty, state enforcement actions are usually limited to extreme cases. On a conceptual level, however, holding judges answerable for incompetence is defensible insofar as the judge who, through indifference or incapacity, does not maintain minimum standards of competence (which can manifest itself in decision-making), compromises the effective administration of justice, disserves the rule of law, and undermines public confidence in the courts.

³⁷ MODEL CODE OF JUDICIAL CONDUCT Canon 3B(2) (2004).

³⁸ 28 U.S.C. § 352(b)(1)(A)(ii).

³⁹ See THE FEDERALIST NO. 65, at 396 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

⁴⁰ MODEL CODE OF JUDICIAL CONDUCT Canon 3B(2) (2004).

For the most part, however, unintentional decisional error is attributable not to incompetence but to honest mistakes made in the course of resolving often difficult and ambiguous issues of law and fact. Here, the primary means to promote decisional accountability (apart from prophylactic measures like continuing judicial education) are limited to the appellate process, statutory or constitutional amendment, and the court of public opinion.

Thus far, I have avoided a discussion of judicial elections, which are the elephant in the parlor of state judicial accountability. Suffice it to say that judicial elections can serve to hold judges accountable in ways that keep faith with all three objectives of judicial accountability by turning out those who administer their courts ineffectively, behave unethically, or disregard the law intentionally. It is, however, everyone's right to cast her ballot as she sees fit, and there is nothing "improper" about voters exercising their franchise in ways that exceed the appropriate limits of judicial accountability described here. Voters are free to punish honest error, to presume that errors are dishonest, or to strip judges of their tenure for decisions the voters dislike, regardless of whether those decisions are erroneous as a matter of law. Elections can therefore lumber off, crushing judges who have done their best to follow the law. Other means of accountability are likewise vulnerable to misuse, but the longstanding and deeply entrenched independence norms to which I have previously alluded have (with exceptions) kept that impulse in check. Although it is beyond the scope of this article, it is far less clear to me that the norms encircling judicial elections adequately promote appropriate forms of accountability or discourage the inappropriate—which is among the reasons why I have gone on record as a skeptic of judicial elections.⁴¹

THE ROLE OF PRESUMPTIONS IN EVALUATING CLAIMS OF INTENTIONAL JUDICIAL ERROR

While there is some uncertainty at the margins, the institutional, behavioral, and decisional accountability devices described here are accepted parts of the judiciary's landscape. Judicial independence norms allow for judges to be held accountable for their branch, their behavior, and their decision-making. With respect to judicial decision-making, most would agree that intentional disregard of the law—regardless of the motive—is an indefensible usurpation of power by judges who have sworn to follow the law, for which judges are properly accountable to the public and political branches. Con-

⁴¹ See Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43 (2003).

versely, honest mistakes may be corrected by fellow judges via the judicial process and, absent evidence of incompetence, offending judges should be insulated from discipline or other punishment. As Tennessee Justice Adolpho Birch put it, "Judicial independence is the judge's right to do the right thing or, believing it to be the right thing, to do the wrong thing."⁴²

At this juncture, my argument takes a subtle turn from the descriptive to the normative. When it comes to holding judges accountable for competent, honest, decision-making errors, available mechanisms are (as a descriptive matter) limited to the corrective and exclude the disciplinary or punitive, which is (as a normative matter) how it should be. Disagreement persists as to whether the Supreme Court would or should hold that it is unconstitutional for Congress to impeach and remove judges on account of their decision-making, to deprive the federal courts of all jurisdiction to hear cases on a particular issue, to retaliate against the courts by eliminating judicial offices and with them their occupants, or to punish unpopular judges by depleting their nonremunerative resources. I have been content to concede the very real possibility that each of these tactics technically may be within Congress's constitutional authority to exploit. The point of particular interest to me, however, is that disagreement over their constitutionality persists because there are so few test cases—Congress has often threatened to take one or another of these actions, but made good on its threats only rarely.

The argument that I have developed elsewhere, and will not reprise here at length, is that Congress's traditional or customary reticence to punish judges for their decisions is the product of a deeply entrenched constitutional norm that prizes the need for judicial independence as a means to perpetuate rule of law values (including the separation of powers). It is a norm that gradually emerged to govern the relationship between the courts and Congress over time that exists independently of constitutional "law" as delineated by the Supreme Court. This norm can be defended with reference to the role that a judiciary ought to play in a representative democracy in which the powers of government are separated, as Professor Peter Shane has explained:

It is not exaggeration to say that a republican system of government, defined in the American tradition, depends upon the judicial capacity to enforce constitutional limits on legislative and executive power. Independence sufficient to render judi-

⁴² Linda Greenhouse, *Judges Seek Aid in Effort To Remain Independent*, N.Y. TIMES, Dec. 10, 1998, at A20.

cial review meaningful is a corollary requirement of republican constitutional order.⁴³

If one embraces the institutional norm that judges must be afforded a measure of decisional independence to perpetuate the rule of law through the exercise of judicial review, some might still challenge the relevance of a dichotomy between intentional and unintentional error. Even if “activist” judges delude themselves into honestly believing that they are following the law, the argument is that the result is no more tolerable and, thus, should be no less subject to political sanction.

From this perspective, judicial independence principles operate only within boundaries set by the outer limits of acceptable judicial discretion. Professors John Ferejohn and Larry Kramer capture this sentiment nicely when they describe judicial independence in terms of its capacity to “foster a decisionmaking process in which cases are decided on the basis of reasons that an existing legal culture recognizes as appropriate.”⁴⁴ By negative implication, independence norms should not insulate a judge from majoritarian sanction for decisions that fall outside the boundaries of what the legal culture regards as appropriate, regardless of the judge’s intentions or motives. For example, in evaluating how far the First Amendment goes to protect symbolic expression, reasonable minds may disagree as to whether the First Amendment freedom of speech affords a protester the right to burn a flag in front of a legionnaire—yes and no answers can both be defended with reasons acceptable to our legal culture. On the other hand, no comparable room for uncertainty exists as to whether the First Amendment gives a protester the right to burn a legionnaire in front of the flag and, if a court were to uphold such a “right,” the ruling would exceed the tolerable limits of judicial discretion. For purposes of deciding whether (and how) to hold the judge accountable for this latter decision, should it really matter whether the misguided jurist truly believed she was following the law?

In a word: yes. As a conceptual matter, one may accept that decisional independence operates within the limited sphere that Ferejohn and Kramer posit. That sphere, however, is elastic and its limits are defined with reference to judicial decisions on the edge of public acceptance. To threaten or punish judges with loss of tenure, resources, or jurisdiction for honestly held but unacceptable views of the law,

⁴³ Peter M. Shane, *Interbranch Accountability in State Government and the Constitutional Requirement of Judicial Independence*, 61 LAW & CONTEMP. PROBS. 21, 30 (1998).

⁴⁴ John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 971-72 (2002).

encourages judges to jettison their conceptions of what the law requires in favor of what they believe those in a position to punish them want to hear—which is antithetical to the rule of law values that customary independence is calculated to preserve. This is not to suggest that judges should be unaccountable for unacceptable decisions—decisions at the edge are subject to appellate review. They give rise to discussions in the media, which elicit reactions from voters, who petition the political branches, which explore amendments to existing law that judges must consider anew. Meanwhile, those charged with selecting new judges consider whether the ideological bent animating the problematic judicial decision falls so far outside the mainstream that like-minded jurists should be excluded from the candidate pool. In short, the question is not whether judges should be accountable for decisions that exceed the limits of public acceptance, for the answer is clearly yes. The real question is *how* they should be accountable and how timid we want judges to be in their forays to the edge. If the objective is to preserve the rule of law as best we can, it would seem that the dichotomy between honest and dishonest error needs to be preserved, and that in the case of honest error, accountability should be limited to corrective measures, and exclude punitive ones.

If one preserves the dichotomy between honest and dishonest error and accepts that the latter is properly subject to forms of accountability that the former is not, a lingering problem remains as to classification. Court critics who propose to hold judges more accountable for their decisions are concerned by judicial rulings that they characterize as deliberate usurpations of power—not unintentional errors. Court supporters look at those same rulings and often maintain that the judges did not err at all—let alone intentionally; to sanction such judges for reaching the right result or at worst making simple mistakes cuts to the quick of judicial independence.

In other words, court defenders and detractors classify the same events in fundamentally different ways: one side's incisive ruling or innocent mistake is the other side's naked power-grab. The question then becomes one of proof or, absent access to proof, one of presumptions.

To prove that a judicial ruling constitutes a willful usurpation of power, one must first show that the ruling in question is erroneous, which is easier said than done. In the federal courts, recent allegations of judicial activism (which I regard as another way of saying that the judge has abused her power by intentionally disregarding the law in the service of personal or political objectives) almost always arise in the context of constitutional cases, where the law is in a state of ex-

treme flux. Lawrence Tribe made the point powerfully in an open letter explaining his decision not to publish a new edition of his constitutional law treatise:

There is a time to write a constitutional law treatise . . . but this is not such a time. The reason is that we find ourselves at a juncture where profound fault lines have become evident at the very foundations of the enterprise, going to issues as fundamental as whose truths are to count and, sadly, whose truths must be denied. And the reality is that I do not have, nor do I believe I have seen, a vision capacious and convincing enough to propound as an organizing principle for the next phase in the law of our Constitution.⁴⁵

The “profound fault lines” to which Tribe refers, engender irresolvable disagreements over the merits of controversial constitutional cases and open the door to accusations of activism from losing litigants and their supporters that are as difficult to debunk as they are to prove.

As a practical matter, however, the difficulty of proving judicial error pales in comparison to the difficulty of proving that the error was intentional. In aberrational cases, judges may concede that they have deliberately disregarded the law. For example, Alabama Chief Justice Roy Moore was removed from office for openly refusing to comply with a federal court order to remove a display of the Ten Commandments from his courthouse.⁴⁶ Such cases are extremely rare; instead, judges almost invariably profess to follow what they think is the law, and reveal nothing in their rulings to sully the purity of their stated intentions.

Court critics resolve this difficulty (often implicitly) by presuming bad intent from the egregiousness of the error itself. If judicial error is presumptively intentional, however, it effectively eliminates the distinction between intentional and innocent error (by presuming the latter out of existence) and thereby extinguishes the independent judge’s “right to do the wrong thing,” as long as she “believ[es] it to be the right thing.”⁴⁷

If judicial independence means anything, it means that judges who do their best to follow the law should not fear punishment, even when they err—necessitating a rebuttable presumption that judges have

⁴⁵ Lawrence H. Tribe, *The Treatise Power*, 8 GREEN BAG 2D 291, 294-95 (2005).

⁴⁶ Robert Marus, *Moore Loses Final Appeal To Save Job as Chief Justice*, UNITED BAPTIST PRESS, May 4, 2004.

⁴⁷ See Greenhouse, *supra* note 42.

acted in good faith, absent evidence to the contrary. Such a presumption may impose an onerous burden on those who would hold judges more closely accountable for "activist" decision-making by requiring them to prove the unprovable. It is, however, a presumption no less difficult to overcome than that which targeted judges would have to meet if the contrary presumption (that judicial errors are ill-motivated) were imposed and strikes a more defensible balance between judicial independence and accountability.

The law of defamation provides a useful analog. Exposing reporters to defamation liability for innocent mistakes may dampen their ardor to pursue the truth and lead them to approach the targets of their investigation with excessive caution and deference. And so the Supreme Court has made the media answerable for the defamation of public figures only when their mistakes are knowingly false or made in reckless disregard of the truth—in other words, the Court has employed a dichotomy between intentional and unintentional error akin to that which I have proposed here. That still leaves the question of where the presumption lies: should the accuser bear the burden of showing that a mistake was willful or should the accused be required to show that the mistake was innocent? Given the difficulty of proving (or disproving) one's state of mind, whichever presumption one adopts will typically dictate the outcome. Accordingly, if we are serious about buffering the media from defamation liability for innocent mistakes, we must presume that their statements are innocent unless the plaintiff proves otherwise. Thus, to establish their claim, a plaintiff must produce "clear and convincing evidence" to demonstrate that the media's statements were knowingly or recklessly false.⁴⁸ Such a burden requires the plaintiff to do more than simply point to the defendant's erroneous statement and urge the fact finder to infer from its falsity that the defendant must have known it was untrue.⁴⁹

The history of judicial impeachments tells a surprisingly similar story that I have recounted at length elsewhere.⁵⁰ In 1805, Justice Samuel Chase was impeached by the House of Representatives for high-handed judicial decision-making. At his Senate trial, Justice

⁴⁸ See *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 511 (1984) ("Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice.'").

⁴⁹ *Id.* at 486 ("The Court of Appeals correctly concluded that there is a significant difference between proof of actual malice and mere proof of falsity, and that the requisite additional proof was lacking in this case."); 50 AM. JUR. 2D *Libel and Slander* § 33 (2004) ("Actual malice cannot be imputed merely because the information turns out to be false. An erroneous interpretation of the facts does not meet the standard of actual malice.").

⁵⁰ See GEYH, *supra* note 20.

Chase drew a distinction between innocent and ill-motivated error that resonates to this day. For Chase, "ignorance or error in judgment" is an impeachable offense only if it has "flown from a depravity of heart, or any unworthy motive."⁵¹ Accordingly, if the Senate found that he "hath acted in his judicial character with wilful injustice or partiality, he doth not wish any favor; but expects that the whole extent of the punishment permitted in the constitution will be inflicted upon him."⁵² If not, Chase was "confident that this court will make allowances for the imperfections and frailties incidental to man."⁵³ The House managers (who prosecuted Chase in the Senate), argued that the Senate should presume an ill-motive from the errors themselves. Manager George Campbell explained:

The judge insists, if he was mistaken, it was an error of judgment. This cannot be presumed. Ignorance of the law is no excuse in any man; but in a character of such high legal standing and known abilities as that of the accused, it is totally inadmissible and not to be presumed. How could any judge with upright intentions commit so many errors, or hit upon so many mistakes in the course of one trial They must have been the result of design⁵⁴

Justice Chase's counsel, Philip Barton Key, argued for the opposite presumption, insisting that "the best gifted mortals are frail, and a single erroneous decision may be made by any man."⁵⁵ He cited English precedent for the proposition that "an error in judgment has never of itself been considered an evidence of corruption in a judge" and concluded that "however gross the error of the judge, it cannot in itself contain any foundation for presuming fraud."⁵⁶ Key would appear to have won the argument since Justice Chase was acquitted on all counts.

The same arguments were replayed at the 1830 Senate impeachment trial of district judge James Peck, who had been impeached for abusing his contempt power in an isolated case. Both sides agreed that dishonest errors were impeachable while innocent ones were not. House manager James Buchanan insisted that a bad motive should be presumed from the gravity of the error itself, for "[i]f a judge has cru-

⁵¹ 1 TRIAL OF SAMUEL CHASE 102 (DeCapo Press 1970) (1805) (statement of Justice Chase) (emphasis omitted).

⁵² *Id.*

⁵³ *Id.* (emphasis omitted).

⁵⁴ *Id.* at 383.

⁵⁵ *Id.* at 81.

⁵⁶ *Id.*

elly and illegally imprisoned and punished an American citizen, the court before whom he is impeached will never set out to hunt after a good motive for this bad action.”⁵⁷ Judge Peck’s counsel begged to differ, stressing that “guilty intention is not to be inferred from the alleged incorrectness of his judicial opinion, but must be satisfactorily proved by the evidence in the cause.”⁵⁸ For Judge Peck and his lawyers, buffering judges from impeachment for innocent errors was essential to preserving judicial independence. As Peck’s counsel explained in his closing argument:

The question before you, sir, is not that of Judge Peck alone. It is the question of the independence of the American judiciary Is this Court prepared to suspend the sword by a hair over the heads of our judges, and constrain them to the performance of their duties amidst fear and trembling from the terrors of an impeachment?⁵⁹

Once again, the Senate voted to acquit.

The final Senate trial in which a judge was impeached (at least in part) for decision-making error occurred in 1905 and featured district judge Charles Swayne, who, like Peck, was accused of abusing his contempt power in a single case. Once again, those who favored Swayne’s removal argued that “[i]f an unlawful act is committed by a judge . . . the law conclusively presumes an evil intent.”⁶⁰ They were quite candid that absent such a presumption, it would be nearly impossible to obtain a conviction because “[i]t is not to be expected that a judge who intends to use his judicial power to gratify his malice or ill will or to punish one he hates will declare the fact in advance or confess it after the sentence is pronounced.”⁶¹ Swayne’s counsel, in response, countered with a familiar argument that explicitly linked the House managers’ burden to overcome a presumption that Judge Swayne’s error was innocent to judicial independence:

Unless you show his dishonesty or malice in his judicial action he is protected by that shield which the wisdom of our judicial system throws around the bench, for if a man may be questioned for his decision from the bench, even if he be wrong, if for a decision wrongfully given from the bench he

⁵⁷ ARTHUR J. STANSBURY, REPORT OF THE TRIAL OF JAMES H. PECK 428 (1833).

⁵⁸ *Id.* at 489 (argument of William Wirt) (emphasis omitted).

⁵⁹ *Id.* at 573.

⁶⁰ 58 CONG. REC. 214, 221 (1904).

⁶¹ PROCEEDINGS IN THE SENATE OF THE UNITED STATES IN THE MATTER OF THE IMPEACHMENT OF CHARLES SWAYNE 76 (1905) (statement of Congressman Henry Palmer).

may be punished, imprisoned, or removed, our judiciary has no protection.⁶²

As with each of the preceding trials in which judges stood accused of impeachable, decision-making error, Swayne was acquitted.

By the 1940s, the House had learned its lesson, and ceased to initiate impeachment investigations into allegations of judicial error. In the 1980s, the House Judiciary Committee was deluged with over 100,000 letters calling for an impeachment inquiry into the conduct of three circuit court judges who had ordered a new trial for a defendant in a capital murder case. The Chairman of the House Judiciary Committee's Subcommittee on Courts issued a report that bluntly declined to initiate such an inquiry:

Federal judges should not and cannot be impeached for judicial decisionmaking, even if a decision is an erroneous one. The conduct complained about—entering a judgment and order—is an act that judges are required to do under the Constitution. It would be a great irony if the protections found in the Judiciary's constitutional charter—Article III—did not shield judges in their decisionmaking role.⁶³

Although threats to impeach errant judges for usurping power still trip off the tongues of angry legislators, few take such threats seriously. This is not to suggest that such threats are meaningless: the specter of an impeachment inquiry—even an unsuccessful one—may well serve to chasten, if not intimidate targeted judges.⁶⁴ But the point, for purposes here, is that independence norms of long-standing vintage have given rise to a presumption that errant decision-making is not ill-motivated absent convincing evidence to the contrary.

The issue of presumptions has not explicitly arisen outside the context of impeachment proceedings, which is not especially surprising insofar as impeachment looks and feels a lot like a criminal process, where the need to allocate burdens of proof between accused and accuser is pretty obvious. The role of presumptions is not as readily apparent when it comes to legislative proposals aimed at curbing judicial action. Presumptions are nonetheless relevant to all forms of

⁶² *Id.* at 683 (statement of John Thurston).

⁶³ H. COMM. ON THE JUDICIARY, 99TH CONG., FINDINGS AND CONCLUSIONS OF ROBERT W. KASTENMEIER ON CITIZEN PETITIONS TO IMPEACH THREE FEDERAL JUDGES 8 (1986) (on file with author).

⁶⁴ See Mark O. DeGirolami, *Congressional Threats of Removal Against Federal Judges*, 10 TEX. F. ON C.L. & C.R. 111 (2005) (discussing the effects of impeachment and threatened impeachment of federal judges).

decisional accountability for ill-motivated error. Regardless of whether the sanction is impeachment, disestablishment, a budget cut, or diminished jurisdictional authority, holding judges directly accountable to the political branches for decision-making error is justified if the error is deliberate but not if it is innocent—which begs the questions of where the presumption lies, and what evidence will be sufficient to rebut that presumption.

Implicitly, however, the issue of presumptions has been asked and answered. As noted previously, Congress has developed a long-standing tradition of respect for the judiciary's autonomy.⁶⁵ Legislative proposals to obliterate the judgeships of offending jurists, to deprive the courts of jurisdiction to decide cases on politically sensitive issues, or to starve unpopular courts of legislative resources have—with only isolated exceptions—been rejected as antithetical to judicial independence norms.⁶⁶ Underlying this tradition is the presumption that decision-making errors are innocent; if it were otherwise—if errors were presumptively ill-motivated—then the tradition of respect for the judiciary's independence would be utterly irrational in that it would be aimed at insulating judges from direct political accountability for presumed abuses of power.

Speakers at the Symposium where a draft of this article was discussed were of the view that in an age of legal realism, the line I have drawn between intentional and unintentional error—if it exists at all—may be too indistinct to be useful.⁶⁷ To be sure, legal realism has taught us that when it comes to Supreme Court decision-making, law and politics can converge inextricably. Justices predictably rule in a manner consistent with their political ideologies and there is no easy way to separate the justice whose ideology merely influences his understanding of what the law is from the justice who intentionally disregards the law in the service of his political agenda. And so, one can trot out a parade of Supreme Court cases and ask, almost rhetorically, was a particular justice's "error" intentional. If we are truly serious about protecting the judiciary's independence, do we really want to start investigating the motives of justices in controversial cases?

⁶⁵ See GEYH, *supra* note 20; see also Charles G. Geyh, *Judicial Independence, Judicial Accountability, and the Role of Constitutional Norms in Congressional Regulation of the Courts*, 78 IND. L.J. 153 (2003) (discussing Congress's approach toward judicial autonomy).

⁶⁶ GEYH, *supra* note 20.

⁶⁷ See Susan Bandes, *Judging, Politics, and Accountability: A Reply to Charles Geyh*, 56 CASE W. RES. L. REV. 947, 955 (2006) (arguing that the taxonomy presented here overlooks many factors that make judges insufficiently accountable); William P. Marshall, *Judicial Accountability in a Time of Legal Realism*, 56 CASE W. RES. L. REV. 937, 945 (2006) (questioning whether one can clearly identify decisional errors and, further, whether it is wise to punish judges for all such errors).

I have three responses. First, I do not share my colleagues' obsession with the United States Supreme Court. Pound for pound, the justices of the Supreme Court are more influential than other judicial officers but they are hardly representative of judges as a class. The Supreme Court is truly unique among American courts in that it alone may say (and its justices have said) that the law means whatever the Supreme Court says it means.⁶⁸ Insofar as the Supreme Court is thereby authorized to make constitutional policy and liberated to conform the law to its ideological vision, distinguishing intentional from unintentional disregard of the law may be a less meaningful exercise (because the law is what the Court says it is). But the ground rules for other judges are different and when it comes to the administration of justice in the United States, there are over twenty-nine thousand of these "other" judges in the state courts alone, who hear over one hundred million cases filed each year, as compared to the nine U.S. Supreme Court justices who decide fewer than ninety cases in that same time.⁶⁹

Second, even on the Supreme Court, the distinction between intentional and unintentional error retains validity at a *conceptual* level. The triumph of legal realism forces us to abandon the antiquated, formalist notion that in judicial decision-making, law means everything. But we are not required to embrace the opposite extreme that law means nothing and, indeed, the research of neo-institutionalist political science scholars cautions against so sweeping a conclusion.⁷⁰ If the law still means *something* to judges, then the longstanding rationale for an independent judiciary (including an independent Supreme Court)—to buffer judges from interference with their capacity to uphold the law as they construe it to be written—retains vitality. In this context, the justice who intentionally disregards the law in the service of ideological objectives abuses her independence, violates her oath of office, and properly subjects herself to sanction, while the justice who follows the law as she reads it, even if her reading of the law is profoundly influenced by her political ideology, does

⁶⁸ CHARLES E. HUGHES, ADDRESSES AND PAPERS OF CHARLES EVANS HUGHES 139-41 (1908) (highlighting that "the Constitution is what the judges say it is").

⁶⁹ See NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS, 2004: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT 16 (2004) (reporting that 100.1 million cases were filed before 29,373 state-court judicial officers in 2003), available at http://www.ncsconline.org/D_Research/csp/2004_Files/EWOVeriew_final_2.pdf. For data on the U.S. Supreme Court, see <http://www.supremecourtus.gov/publicinfo/year-end/2005year-endreport.pdf> (reporting eighty-seven Supreme Court cases argued and eighty-five decided in the 2004 term).

⁷⁰ Howard Gillman & Cornell Clayton, *Beyond Judicial Attitudes: Institutional Approaches to Supreme Court Decision-Making*, in SUPREME COURT DECISION-MAKING 1, 6-7 (Clayton & Gillman eds., 1999).

not. The problem, of course, is that the line separating intentional from unintentional disregard for the law is virtually *never* so clear in practice because justices rarely admit to usurping power—but that does nothing to undermine the conceptual validity of the distinction.

Third, the practical difficulty of parsing intentional from unintentional error is properly resolved with reference to the presumption of innocence I have highlighted. Because deeply entrenched norms of judicial opinion-writing almost inevitably lead the authors of judicial decisions to characterize their rulings as well-intentioned efforts to follow the law, the presumption of innocence is virtually irrebuttable absent extrinsic evidence of bribes or favoritism, which has always subjected judges to removal. The net effect of this presumption, which has been in place for two centuries, has not been to invite independence-threatening inquiries into the motives of judges, but to thwart them. And that is how it should be.

CONCLUSION

The thrust of this essay has been twofold. First, judicial accountability features a variety of permutations, virtually none of which undermine judicial independence, properly understood. To the contrary, institutional, behavioral, and decisional accountability preserve an environment in which an independent judiciary is not only tolerated, but revered. Second, recent efforts by some court critics to punish judges for so-called activist decision-making exceeds the appropriate limits of decisional accountability. Although one may fairly conclude that discipline or punishment is warranted for judges whose decisions deliberately usurp political power, judicial independence norms logically require, and historically have required, that we begin with a presumption that the judicial errors are innocently motivated—a presumption that cannot be overcome simply by pointing to the decision itself and declaring “*res ipsa loquitur*.”

